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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1082

JAMES RUSSELL HAWTHORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James Russell Hawthorne, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered February 3, 1966, affirming in part a judgment of conviction of the United States District Court for the Southern District of West Virginia.

OPINION BELOW

The opinion of the Court of Appeals, reported as *United States of America v. James Russell Hawthorne,* ..... F. 2d ..... (4th Cir., 1966), is printed as Appendix A hereto.

JURISDICTION

On November 25, 1964, after a jury trial Petitioner was convicted of two charges of use of interstate facilities to promote illegal gambling enterprises in violation of 18 U.S.C.A., Sec. 1952, and he was sentenced to concurrent five-year terms of imprisonment. On February 3, 1966, the Court of Appeals reversed the conviction as to the first count of the indictment, and, affirming the conviction as to the charge of the second count, remanded the case to the District Court for reconsideration of the sentence which had been imposed.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err when it held that intent to violate local law is an essential element of the offenses punished by 18 U.S.C.A., Section 1952 only when such intent is necessary to constitute a crime under the law of the jurisdiction in which the illegal enterprise is located, notwithstanding the facts that: (a) Section 1952 is a felony statute carrying severe penalties whereas the local offenses are often minor misdemeanors; (b) the legislative history of Section 1952 demonstrates clear congressional purpose to the contrary; and (c) the reading adopted by the Court of Appeals raises a serious constitutional question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Federal Anti-Racketeering Act, codified in 18 U.S.C.A., Section 1952, relating also to the Indiana statute prohibiting slot machines, Sections 10-2326 and 10-2328 of Burns Indiana Statutes, right to travel guar-

anteed by the due process clause of the Fifth Amendment to the Constitution of the United States and the right to jury trial guaranteed by the Sixth Amendment to the Constitution. They are set forth as Appendix B hereto.

STATEMENT OF THE CASE

On September 18, 1963, the Grand Jury for the Southern District of West Virginia returned a two-count indictment against James Russell Hawthorne, charging him with two violations of 18 U.S.C.A., Section 1952. The first count alleged on or about October 11, 1962, Mr. Hawthorne traveled from Elkhart, Indiana, to Greenbrier County, in the Southern District of West Virginia, "with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being the operation of the 19th Hole, a business enterprise involving gambling in violation of Chapter 61, Article 10, Section 1, of the Code of the State of West Virginia, that is Keeping and Exhibiting a Gaming Table and Device," and that "thereafter, in the Southern District of West Virginia, said defendant did perform and attempt to perform acts facilitating the carrying on of said unlawful activity . . ." (R. 4). The second count charged that Mr. Hawthorne, on or about April 25, 1963, caused the wire facilities of the Western Union Telegraph Company to be used in interstate commerce "with intent to distribute the proceeds of an unlawful activity . . . in that he caused a Western Union Money Order representing the proceeds" from slot machines illegally kept in Ligonier, Indiana, in violation of Sections 10-2326 and 10-2328 of Burns Indiana Statutes, to be transmitted from Ligonier, Indiana, to Greenbrier County, in the Southern District of West Virginia, and that "thereafter, in the

Southern District of West Virigina, the said James Russell Hawthorne did distribute and attempt to distribute the proceeds of the said unlawful activity to himself . . ." (R. 4-5).

The theory of the prosecution with respect to the first count was that Mr. Hawthorne was guilty of illegal interstate travel when, in October, 1962, he moved his family from Indiana to West Virginia where he had a supper club which, in addition to the service of food and drinks, would provide its patrons with facilities for gambling (R. 9-13). As to the second charge, that of illegal use of interstate wire facilities, it was claimed that $230.52 which was wired to Mr. Hawthorne in West Virginia from Indiana represented his share of the proceeds from several slot machines owned by him in partnership with Glenn L. Monk and kept on the premises of the Eagles Club, a private social club in Ligonier, Indiana (R. 5-8, 13-16).

The principal evidence as to the allegations of the second count of the indictment came from Mr. John Leming, a bartender employed at the Eagles Club in Ligonier since July, 1962 (R. 24). From the time of his employment, he said, three slot machines were kept on the premises in a room next to the card room, and once a week the coins would be removed from the machines, counted and divided. Mr. Monk and Mr. Hawthorne would come to the Club for this purpose, and, on one occasion, soon after Mr. Leming began working there, Mr. Hawthorne told him that he and Mr. Monk owned the machines as partners (R. 25-26). Accurate records of the machine income were kept, and Mr. Leming identified entries that had been made at the weekly counting sessions in which were reflected each week's profits and the amount of federal wagering excise tax which was paid (R. 26-28).

Mr. Leming said that in approximately the fall of 1962 Mr. Hawthorne stopped coming to the Eagles Club to collect his share of the profits from the machines, and Mr. Leming simply put his share in a safe in an envelope on which his name was written (R. 29). Mr. Leming testified that in April, 1963, Mr. Hawthorne telephoned from West Virginia and asked him "to send him the money that he believed to be at the Eagles for him . . ." to White Sulphur Springs by Western Union (R. 29-30). He went to the safe, Mr. Leming related, and in Mr. Hawthorne's envelope he found $235.00 which he took to the Western Union office in Ligonier, Indiana (R. 30). A telegraphic money order was transmitted to the Western Union office in White Sulphur Springs, West Virginia (Gov't Ex. 9; R. 36), and that office prepared a draft which was delivered to Mr. Hawthorne on April 25, 1963 and cashed by him (Gov't Ex. 10; R. 36, 180).

Mr. Monk, testifying for the Government, produced a formal partnership agreement between Mr. Hawthorne and himself, dated May 1, 1963, in which each of the partners was described as having a 50% interest in a gaming device business (Gov't Ex. 7; R. 78-80, 176-177). The partnership, Mr. Monk said, owned three slot machines, all of which were located at the Eagles Club. One machine took nickels, another, dimes, and the third, quarters (R. 80).

Leonard A. Wissman, a Special Agent of the FBI assigned to the Indianapolis, Indiana office, said that he interviewed Mr. Hawthorne at his home in North Webster, Indiana on October 1, 1962 and that Mr. Hawthorne told him that he had a total of twelve machines in fraternal organizations in Indiana and that he had a federal gambling stamp for each of the machines. Mr. Wissman said that Mr. Hawthorne also told him of his profit from the machines and of his plans to enlarge his business (R. 19). Eight

months later, on June 3, 1963, Agent Wissman related, he went to the Eagles clubhouse in Ligonier, where, in the presence of Messrs. Monk and Leming, he observed three slot machines. Mr. Monk had a key to the machines, and he opened them so that Agent Wissman could check the serial numbers which they bore (R. 20).

A motion for judgment of acquittal was made at the close of the Government's case (R. 98-102). It was renewed after both sides had rested (R. 145-146), and, after it was denied, the attorneys for both sides submitted proposed instructions to the District Judge. Government's Requested Instruction No. 12 outlined the essential elements of the first count (R. 157). It included the requirement that the jury, in order to convict the defendant of illegal travel, must find that the defendant not only intended to establish a gambling enterprise in West Virginia, but also that he intended to violate the gambling laws of West Virginia. For some unexplained reason, however, the element of intent to violate local law was not included in the requested instruction with respect to the second count, Government's Requested Instruction No. 25 (R. 158).

The charge was given as requested, and as to the first count, the Judge said:

> "Now with respect to the elements which you must find with respect to count one, you must be convinced beyond a reasonable doubt that the defendant was guilty of each of the following things:
>
> "First, that he traveled in interstate commerce from Elkhart, Indiana, to a point near White Sulphur Spring, West Virginia.
>
> "Second, that James R. Hawthorne traveled with the intention to promote, manage, establish or carry on or facilitate the promotion, management, establishment or carrying on of an unlawful activity, that is, illegal gambling in violation of the laws of the State

of West Virginia at the 19th Hole Supper Club in White Sulphur Springs.

"The third element which you must find in regard to count number one would be that James R. Hawthorne beyond all reasonable doubt undertook the operation of the 19th Hole Supper Club and *that the operation of this club was intended to be carried on in violation of the gambling laws of West Virginia;* and fourth, that after James R. Hawthorne traveled in interstate commerce he performed or attempted to perform an act which tended to promote, manage, establish or carry on, or facilitate the promotion, management, establishment or carrying on of this unlawful activity.

"The last element is certainly self-evident, that you might have all the intentions in the world when you crossed the state line, but if you did not take any further steps after crossing the state line to implement this intent, then you would not be in violation of this particular federal law" (R. 165-166). (Emphasis supplied.)

Repeating the inconsistency of the Government's proposals, the element of intent to violate local law was omitted from the charge as to the second count:

"The elements necessary to convict in the second count, are, first, that defendant Hawthorne wilfully caused the use of a facility in interstate commerce — to be exact, the wires of the Western Union Telegraph Company.

"Second, that he caused the use of these facilities with the intent to distribute the proceeds of an unlawful activity, that is, the slot machines in Indiana.

"Third, you would have to find that the slot machines were kept in violation of the law of the State of Indiana, and fourth, that after the telegram in question was sent defendant Hawthorne performed or attempted to perform some act which tended to distribute these proceeds" (R. 168-169).

Mr. Hawthorne was found guilty on both counts, and, after discharging the jury, the District Judge immediately sentenced Mr. Hawthorne to two concurrent five year terms of imprisonment (R. 1-3).

The Court of Appeals, construing the statute narrowly in the light of its effect upon the constitutional right to travel, held that the trip from Indiana to West Virginia, charged in the first count of the indictment, was not sufficiently related to a gambling enterprise to bring it within the interdiction of the statute. There had been no exception to the failure of the District Judge to instruct that intent to violate local law was an element of the offense charged in the second count. The Court of Appeals, however, in obvious deference to the rule that failure to include in a jury instruction an essential element of the offense amounts to a derogation of the defendant's Sixth Amendment right to a jury trial and constitutes plain error cognizable on appeal, considered the question on its merits. See *Screws v. United States,* 325 U.S. 91, 107 (1945); *Byrd v. United States,* 342 F. 2d 939, 942 (1965); *Terminiello v. City of Chicago,* 337 U.S. 1 (1949). Whether such intent is necessary or not, the Court of Appeals held, is to be determined by the law of the place where the illegal enterprise was situated. Since the Indiana statute governing slot machines required no intent, the Court ruled that it was not a necessary ingredient of the federal offense and that the instruction was not deficient.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals that intent to violate state law is not necessarily an element of the offense under 18 U.S.C.A., Sec. 1952, involves important questions of the interpretation of a federal criminal statute which should be settled by this Court. Moreover, the Court of Appeals

appears to have decided these questions out of harmony with applicable decisions of this Court. More specifically: (1) the Court of Appeals has departed from the general policy that, absent, clear congressional purpose to the contrary, acts innocently performed should not be punished; (2) the Court of Appeals failed to give weight to the applicable legislative history of 18 U.S.C.A., Sec. 1952 which confirms congressional purpose that intent to violate local law be an element of the offenses under the statute; and (3) the Court of Appeals adopted a reading of the statute that raises a substantial constitutional question in that the statute, if so read, impinges on the constitutional right to travel.

1. This Court issued its most elaborate statement on the requirement of *mens rea* in penal statutes in *Morissette v. United States,* 342 U.S. 246 (1952). Punishment for acts performed without evil intent, the Court said, is generally "inconsistent with our philosophy of criminal law." *Id.,* at 250. The Court continued: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Ibid.* The Court agreed with the late Roscoe Pound's observation that: "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Id.* at 250 n. 4, quoting from Pound, *Introduction,* SAYRE, CASES ON CRIMINAL LAW (1927). See also, *United States v. Fox,* 95 U.S. 670 (1878). More recently this Court announced that in some circumstances *mens rea* is a constitutional requisite. *Lambert v. California,* 355 U.S. 225

(1957); *Smith v. California,* 361 U.S. 147 (1959). And, Professor Gerhard Mueller, commenting on *Lambert* observed that: "The Court has reaffirmed the proposition, long forgotten by many, that mens rea is an ethicolegal concept. Absolute criminal liability is beginning to end in America." Mueller, *On Common Law Mens Rea,* 42 MINN. L. REV. 1043, 1104 (1958); *Accord,* WILLIAMS, CRIMINAL LAW — THE GENERAL PART, 46-48 (1961).

In *Morissette* it was, however, recognized that after the turn of this century a limited class of minor offenses was created that are punishable without guilty intent as an element. The distinguishing characteristic of this class of offenses is that ". . . penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." 342 U.S. at 256. Speaking earlier and underscoring the importance of the possible penalty, Professor Sayre said: "If this be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind." Sayre, *Public Welfare Offenses,* 34 COLUM. L. REV. 55, 72 (1933). In the instant case, the Indiana slot machine statute, Burns Indiana Statutes, Secs. 10-2326, 2328, which required no criminal intent, made violation only a misdemeanor punishable by a maximum fine of $500.00 to which might be added imprisonment not exceeding 6 months. Since under the Indiana statute, intent was not an element of the state offense, the Court of Appeals ruled that it was not an element of the federal offense under 18 U.S.C.A., Sec. 1952, notwithstanding the fact that violation of section 1952 is a felony punishable by imprisonment of five years and a fine of $10,000.00. In so doing, the Court of Appeals failed to give the important factor of extent of punishment the consideration which it was due.

2. The Court of Appeals, in addition, overlooked the teaching of the *Morissette* case that whether *mens rea* is an essential element of a federal offense should be determined in light of congressional purpose as revealed by legislative history. Section 1952, in terms, requires "intent to . . . carry on . . . unlawful activity," and its legislative history is replete with evidence that it was the purpose of Congress that intent to violate local law be an essential element of offenses under the statute. As Senator Kefauver observed during the Senate hearings, "if a person is going into a State *for the purpose of committing certain crimes*, then he would be in violation of Federal Law." Senate Judiciary Committee Hearings, *The Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong. 1st Sess. (1961), p. 94. (Emphasis supplied.) Further evidence of congressional purpose is found in the comments which were addressed to an alternative statute which the American Bar Association had endorsed and which was introduced by Senator Keating as Senate Bill 710. Senate Hearings, pp. 95-96. The ABA proposal was drawn in language somewhat more traditional to the criminal law and labelled a "conspiracy" statute. It set forth, in explicit terms, the requirement of intent "to commit any organized crime offense against any of the several states."[1]

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[1] S. 710 would have amended Title 18 of the United States Code by adding the following as Section 373:

"§ 373. Conspiracy to commit organized crime offense against any of the several States.

"If two or more persons conspire to commit any organized crime offense against any of the several States, and one or more of such persons, to effect the object of the conspiracy, delivers for shipment or transports in interstate commerce any article, or deposits in the mail or sends or delivers by mail any letter, package, postal card, or circular, or transmits or causes to be transmitted in interstate commerce any message or communication by wire or radio, or receives any article, letter, package, postal card, circular, message, or communication after such ship-

When Assistant Attorney General Miller appeared to sponsor the administration bill, later enacted as Section 1952, he commented that the ABA proposal "does substantially the same thing." Senator Keating inquired: ". . . [T]hat bill, S. 710, would cover all those offenses that would be covered by your bill, would it not?" "Oh, yes, sir," Mr. Miller replied. "And of course," Senator Keating continued, "it would go considerably further." Mr. Miller agreed again, commenting that he "would certainly personally have no objection" to S. 710. Senate Hearings, *Id.*, p. 111.

One compelling reason for requiring the element of intent to commit a local crime is the fact that gambling laws differ so greatly among the States. As Mr. Miller noted in the course of his testimony, Nevada has general legalized gambling, some states permit general legalized gambling in some of their counties under local option provisions, other states sanction certain lottery games and other games of chance. Senate Hearings, *Id.*, p. 295. Furthermore, in their comprehensive study, Bauman and King observed that "Slot machines and related devices are adequately covered by the laws of only a few states . . ." Bauman and King, *A Critical Analysis of the Gambling*

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ment, transportation, sending, delivery, or transmission, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If however, the offense, the commission of which is the object of the conspiracy, is punishable by a lesser maximum fine or imprisonment than provided in this section, the maximum punishments for such conspiracy shall not exceed such lesser maximums.

"As used in this section, the term 'organized crime offense' means any offense proscribed by the laws of or the common law as recognized in any State relating to gambling, narcotics, extortion, intoxicating liquor, prostitution, criminal fraud, or false pretenses, or murder, maiming, or assault with intent to inflict great bodily harm, and punishable by imprisonment in a penitentiary or by death."

Laws, in ORGANIZED CRIME AND LAW ENFORCEMENT (Ploscowe, Ed. 1952, THE REPORT BY AND RESEARCH STUDIES PREPARED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME). They also reported that:

> "States having no specific slot machine statutes attempt to deal with the problem in various ways. Most prevalent is a prohibition against the 'keeping of gaming devices' relied upon by seventeen states. This type of statute is directed only at the 'keeper' of the device. Lack of definitions as to what constitutes a 'gaming device' embroils law enforcement authorities in litigation with seasoned slot machine lawyers. Only four states avoid the problem by listing the slot machine as a specifically prohibited gaming device." *Id.*, at 101-02.

Some states have given slot machines official sanction, for "it must be remembered that such machines are licensed and allowed to operate legitimately in a few states." *Id.*, at 111, n. 66. See also *United States v. Fabrizio*, petition for cert. granted, 34 U.S. L. Week 3281 (U.S., Feb. 22, 1966) (No. 860).

It is not lightly to be assumed, as the Court of Appeals did here, that Congress failed to "define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited." *Screws v. United States*, 325 U.S. 91, 96 (1945). In other instances, it should be noted, where federal legislation was enacted under the commerce clause to implement State policy, Congress, in deference to the problems inherent in varying local statutes, has required intent to commit a local offense as an element of the federal crime. The Webb-Kenyon Act, 37 Stat. 699 (March 1, 1913), for example, which was upheld in *Clark Distilling Co. v. West'n Md. Ry. Co.*, 242 U.S. 311 (1917), prohibited the interstate shipment of intoxicating liquor by persons who in-

tended that it be received, possessed, sold or used in violation of the law of the state to which it was shipped.[2] Similarly, the Ashurst-Summers Act, 49 Stat. 494 (July 24, 1935), held constitutional in *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334 (1937), made it a crime to transport prison made goods into any State where it was intended that they be received, possessed, sold or used in violation of local law. There is no valid reason why Section 1952 should be read, as the Court of Appeals did here, in a manner inconsistent with the statutes on which it is patterned. The fact that the federal statute is superimposed upon state legislation is a further reason for narrow construction, for such a construction "more nearly preserves the traditional balance between the States and the national government in law enforcement . . ." *Screws v. United States*, 325 U.S. 91, 106 (1945), citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

3. In its interpretation of Section 1952, the Court of Appeals failed to give full force to the twin doctrines, articulated by this Court, that criminal statutes are to be

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[2] The *Clark Distilling Company* case has been the basis on which Section 1952 has been sustained against challenges to its constitutionality:

> "By appellants' second Specification it is claimed that Title 18 U.S.C. § 1952 is unconstitutional because it denies equal protection of the laws on the theory that, if read to apply only in states where gambling is illegal, residents of such states are discriminated against and hence denied equally under the law guaranteed by the due process clause of the Fifth Amendment.
>
> "Legislation which constitutes an exercise by Congress of its plenary power over commerce is not repugnant to the due process clause of the Fifth Amendment merely because of variation in State Laws. *Clark Distilling Company v. Western Maryland Railway Company*, 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1916). Cf. *United States v. Ryan*, 213 F. Supp. 763, 766 (D.C. Colo., 1963)." *Turf Center, Inc. v. United States*, 325 F. 2d 793, 795-796 (9th Cir., 1963).

strictly construed, see, *e.g., Bell v. United States,* 349 U.S. 81, 83-84 (1955); *FCC v. ABC,* 347 U.S. 284, 296 (1954); *United States v. Halseth,* 342 U.S. 277 (1952), and that statutes are to be construed, where possible, to avoid significant constitutional issues, *e.g., Rosenberg v. Fleuti,* 374 U.S. 449 (1963); *Kent v. Dulles,* 357 U.S. 116 (1958); *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944). The Court of Appeals expressly applied the avoidance doctrine when, faced with the constitutional right to travel, it held that the act of travel charged in the first count in the indictment was not within the statute. When dealing with the second count, however, the Court of Appeals overlooked the fact that the intent element in Section 1952 violations is the same whether the act charged involves travel or use of an interstate facility. Thus the Court of Appeals failed to appreciate the deleterious effect upon the right to travel that was inherent in its decision. Conviction for travel without *mens rea* has an effect on the right to travel no less chilling than the effect upon free speech of a statute that punishes a seller of prohibited books who lacks scienter. *Smith v. California,* 361 U.S. 147 (1959); see also, *Lambert v. California,* 355 U.S. 225 (1955), where a convicted felon registration ordinance, having an obviously restrictive effect on the right to travel, was voided because it did not incorporate the element of *mens rea. Cf., e.g., Edwards v. California,* 314 U.S. 160 (1941); *Kent v. Dulles,* 357 U.S. 116 (1958); *Aptheker v. Rusk,* 378 U.S. 500 (1964); CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956) 162-213. The importance of construing Section 1952 in the light of its effect upon the right to travel is highlighted by the fact that the legislative history of the statute is replete with demonstrations of congressional concern to avoid passage of a provision that would impinge too much on this constitutional right.

Anxiety on the part of members of both houses was best exemplified by Senator Carroll's statement, specifically agreed to by Senator Kefauver, that "this whole concept if imposing new restrictions on travel, no matter how urgent the necessity, I think holds many dangers as to the possible expansion of the Federal police powers."[3]

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[3] Senate Hearings, p. 262; see also, e.g., *Id.* at 253-62; Hearings Before Subcommittee No. 5 of the House Judiciary Committee, *Legislation Relating to Organized Crime,* Serial No. 16, 87th Cong. 1st Sess. (1961), pp. 337-39; cf. Senate Hearings, p. 16 (Attorney General Kennedy).

Almost a decade before the passage of this provision, Professor Ivan Rutledge prophetically made the same analysis in his comprehensive study, *Regulation of the Movement of Workers: Freedom to Passage Within the United States,* 1953 Wash. U.L.Q. 270, 290; "This kind of regulation would, it seems amount to an expansion of the area of conduct that can be made criminal considerably beyond the traditional limits of criminal attempts."

It should be noted that numerous witnesses brought the constitutional difficulties to the attention of the Judiciary committee of each house. Senate Hearings, pp. 50-51 (American Civil Liberties Union memorandum); House Hearings, pp. 385-86 (same); Senate Hearings, pp. 94-95 (Mr. Rufus King, President of the American Bar Association); House Hearings, pp. 61-63; (Professor Louis B. Schwartz, University of Pennsylvania Law School); *Id.* at 145, *passim* (Mr. Harris B. Steinberg, president of the National Association of Defense Lawyers in Criminal Cases, and chairman of the Criminal Courts Committee of the New York State Bar Association); *Id.* at 159, 162 ("Report on Proposed Federal Antiracketeering Legislation," of the National Association of Defense Lawyers in Criminal Cases); *Id.* at 179-80 (Mr. Martin M. Nelson, on behalf of the Bally Manufacturing Company, Chicago, Illinois).

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 9817

United States of America,

Appellee,

versus

James Russell Hawthorne,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. John A. Field, District Judge.

(Argued December 9, 1965. Decided February 3, 1966.)

Before Haynsworth, Chief Judge, and Sobeloff and J. Spencer Bell, Circuit Judges.

Arnold M. Weiner and Sanford Jay Rosen (Court-assigned counsel for Appellant, and Alfred N. King, Attorney, Department of Justice, (Milton J. Ferguson, United States Attorney, on brief) for Appellee.

J. SPENCER BELL, Circuit Judge:

The defendant, James Russell Hawthorne, was convicted by a jury of two charges of use of interstate facilities to promote illegal gambling enterprises and sentenced to con-

current five year terms of imprisonment.[1] The first count involved a trip made by the defendant on or about October 11, 1962, from Indiana to West Virginia. The second count involved the use of the facilities of Western Union to transfer $235.00, proceeds from several slot machines owned by the defendant and operated by his partner in Indiana, from that state to the defendant in West Virginia.

The evidence considered favorably to the government showed that early in 1962 the defendant went from his home in Indiana to Greenbrier County, West Virginia, where he investigated the possibility of opening a supper club which would provide gambling facilities to its patrons, in violation of the local law.[2] He discovered that one of

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[1] 18 U.S.C.A., Section 1952, provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

[2] The West Virginia statute:

"Any person who shall keep or exhibit a gaming table, commonly called A. B. C. or E. O. table, or faro bank, or keno table, or any other gaming table or device of like kind, under any denomination, or which has no name, whether the game, table, bank or device be played with cards, dice or otherwise, or shall be a partner, or con-

the existing establishments could be rented and by June had proceeded as far as to discuss the possibility of renting paraphernalia with one of the government witnesses. In early summer Hawthorne returned to West Virginia and made further arrangements for operating his business. He had a corporation set up and entered into a six year lease beginning October 1, 1962. He then returned to Indiana in order to move his family to West Virginia. On October 2, 1962, Hawthorne and his wife purchased a mobile home in Elkhart, Indiana, for delivery to the premises of his supper club at White Sulphur Springs, West Virginia. On October 11th two tanks of bottled gas were connected up to the trailer. It was this trip which occurred on or about the 11th of October which was charged in the first count of the indictment.

It is freely conceded by the government that the immediate purpose of this trip was to move Hawthorne's family from Indiana to the new home. Such a purpose is not sufficiently related to his gambling enterprise to bring it within the interdiction of the statute. We cannot hold that the purpose of that trip was to "promote, manage, establish, carry on, or facilitate . . ." his unlawful enterprise within the meaning of the statute. The statute was intended to make interstate travel or transportation in aid of racketeering enterprises a crime.[3]

It is not the intent of the statute to make it a crime per se for one who operates a gambling establishment to travel interstate. To so hold might raise serious questions of the constitutionality of the Act. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Kent v. Dulles*, 357 U.S. 116 (1958);

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cerned in interest, in keeping or exhibiting such table, bank or gaming device of any character, shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail not less than two nor more than twelve months and be fined not less than one hundred nor more than one thousand dollars. . . ." West Virginia Code of 1961, Chap. 61, Art. 10, § 1.

[3] See generally: Senate Judiciary Committee Hearings, The Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong. 1st Sess. (1961).

Zemel v. Rusk, 381 U.S. 1 (1965). The government cites no case which supports its position. *Masse v. United States*, 210 F. 2d 418 (5 Cir. 1954), *cert. denied*, 347 U.S. 962, a Mann Act case, is not in point. While there it is true the court found that Masse was guilty even though his immoral conduct was not the sole purpose of *his* trip (he also travelled to get a divorce) the substantive offense in the Mann Act is the transportation of the female, not the interstate travel of the transporter himself. *United States v. Sapperstein*, 312 U.S. 694 (4 Cir. 1963); *Williams v. United States*, 271 F. 2d 703 (4 Cir. 1959). In the instant case, however, the essential element of the crime is the interstate travel of the offender himself. We do not rest our decision on the fact that the first proven overt act of gambling did not occur until nearly five months after the trip in question. Other trips Hawthorne took prior to that charged in count one of the indictment were directly related to his enterprise, but the connection with this specific trip is too tenuous. *Cf. Parr v. United States*, 363 U.S. 370 (1960).

We think the defendant was properly convicted under the second count. We do not think the statute (18 U.S. C.A. § 1952) requires proof that the defendant knew that he was violating the Indiana law by operating slot machines in that state, although there was evidence from which the jury could have so found. Such knowledge was not required to convict under the Indiana statute. *Worl v. State*, 243 Ind. 116, 183 N.E. 2d 594 (Sup. Ct. 1962), and we think it sufficient under section 1952 that the defendant knowingly caused to be transmitted interstate by the Western Union money order proceeds of a gambling enterprise which was unlawful under the Indiana statute. Since we have held that the conduct charged in the first count did not violate the statute in question, we remand the case to the district court in order that the judge may reconsider the sentence given on the second count in the light of this opinion.

Reversed and Remanded.

APPENDIX B

18 U.S.C.A., Section 1952:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

Amendment 5, Constitution of the United States of America:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

in life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 6, Constitution of the United States of America:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Burns Indiana Statutes:

"10-2326. Slot machines — owning, operating, possessing or contracting with user, prohibited. — It shall be unlawful: (a) To manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device as hereinafter defined; or

"(b) To make or to permit to be made with any person any agreement with reference to any slot machine or device, as hereinafter defined, pursuant to which the user thereof, as a result of any element of chance or other outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machine or device, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value."

"10-2328. Slot machines — Penalty for violation of act — Seizure. — Whoever shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five [$25.00] nor more than five hundred dollars [$500] to which may be added imprisonment for any period not exceeding six [6] months. Upon conviction of any offender for a violation of this act, the court shall order the sheriff to seize any slot machine or gambling device prohibited by this act, and involved in such cause, the same not being in the possession of any peace officer of this state, and shall order the destruction of such machines or devices so seized by the sheriff, and the court shall also order the destruction of any machine or device as may be in the custody of any peace officer of this state, and involved in such cause."